CHRISTIAN LEGAL SOCIETY
CENTER FOR LAW AND RELIGIOUS FREEDOM

October 24, 2022

Dean Shane Cooper
University of New Hampshire
Franklin Pierce School of Law
2 White Street
Concord, NH 03301

By email: Shane.Cooper@law.unh.edu

Re: Time Sensitive Matter—Registration of the Christian Legal Society Student Chapter at University of New Hampshire

Dear Dean Cooper:

I write on behalf of the Christian Legal Society Student Chapter at University of New Hampshire ("CLS-NH"). CLS-NH seeks recognition as an official student organization at the Franklin Pierce School of Law and has filed the necessary documents to be an officially recognized student organization. Unfortunately, instead of treating the CLS students fairly and with respect, the School of Law's Student Body Association ("SBA") has delayed recognizing CLS-NH and subjected its student leaders to an unseemly inquisition regarding their religious beliefs, particularly religious standards for leaders. Regarding leadership standards, it is a common practice on university campuses—and common sense—not only for religious groups, but also for environmental, pro-abortion or pro-life organizations, and many other advocacy groups, to require that their leaders agree with the organizations' core beliefs.[1]

The SBA is engaging in unconstitutional viewpoint discrimination. Every student has a right to attend a public university without having to identify and defend his or her religious beliefs, or lack thereof. There is no more basic right for any American student. The withholding of recognition from CLS-NH, as well as questions asked by SBA members of CLS student representatives, makes clear that CLS's religious beliefs are unpopular with many members of the SBA Board. The unpopularity of the CLS students' religious beliefs appears to be the reason for the withholding of recognition.

The SBA's withholding of recognition and its unconstitutional examination of the CLS students' religious beliefs are unconstitutional viewpoint discrimination. University officials "must abstain from regulating speech when the specific motivating ideology or

[1] Student organizations meeting at the law school include several advocacy, religious, ethnic, and ideological groups, many of which may often promote controversial viewpoints, including the following: Asian Pacific American Law Association; Black Law Student Association; Environmental Law Society; Federalist Society; Hispanic and Latinx Student Association; LAMBDA; and UNH Law Democrats.

the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (exclusion of religious student organization from allocation of student activity fees because of its evangelical Christian beliefs violated the Free Speech Clause). This same regulation of CLS students' speech because of its "specific motivating ideology or the opinion or perspective of the speaker" is precisely the viewpoint discrimination that the SBA is committing by its withholding recognition of the CLS student organization.

As a result of the SBA's treatment of CLS students, it has become readily apparent that the SBA is unable to render a fair and unbiased judgment as to whether the CLS chapter should be recognized as a student group. As the Supreme Court held 50 years ago, a public college may not deny a student organization recognition or otherwise "restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Healy v. James*, 408 U.S. 169, 187-88 (1972). University administrators, therefore, need to step in and grant official recognition to the CLS chapter.

The SBA's unlawful actions pose a serious threat to the CLS students. The SBA's actions also pose a grave legal threat to University of New Hampshire officials. University administrators are responsible for any unconstitutional and unlawful actions taken by the university's SBA. University officials are ultimately responsible for the final decision whether to recognize an organization. See, *e.g.*, *Bd. of Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217, 233 (2000); *Rosenberger*, 515 U.S. at 832. The SBA may play a role in the process, but the final decision cannot be outsourced to the SBA. When the SBA's actions violate federal law, it is the legal duty of university officials to step in and recognize the group and provide it with all the benefits otherwise available to other student groups.

Federal regulations reinforce the right of religious student organizations to have religious leadership requirements. Two United States Department of Education regulations, 34 C.F.R. §§ 75.500(d) & 76.500(d), set as a material condition on any grants that a university receives from the Department of Education, either directly or through the State or a subgrantee, that the university not deny a religious student organization recognition or other benefits, including funding, "because of its religious beliefs, practices, policies, speech, membership standards, or leadership standards."

Specifically, 34 C.F.R. § 75.500(d) states:[2]

> (d) As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the

[2] 34 C.F.R. § 76.500(d), which regulates Department of Education grants channeled through the State or a subgrantee, is basically identical.

> facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs.

Under federal law, therefore, university administrators have a duty to recognize CLS-NH and grant it all benefits received by other student groups, or risk the loss of federal Department of Education grants.

Recent Ninth Circuit caselaw also supports the right of religious student organizations to have religious leadership requirements. The Ninth Circuit recently ruled that public school officials likely violated the federal Free Exercise Clause when they derecognized a religious student group because it required its leaders to agree with its religious beliefs. *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education,* 46 F.4th1075 (9th Cir. 2022). The Ninth Circuit explained that "in our pluralistic society … the Free Exercise Clause requires the government to respect religious beliefs and conduct." *Id.* at 1093. The court ordered preliminary injunctive relief for the religious student organization, finding that it "will be irreparably harmed by the denial of full … benefits" that accompany recognition given that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 1098 (quoting *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

As the Ninth Circuit explained, a religious organization's free exercise is violated if "a law [that] is not neutral and generally applicable … is selectively enforced against religious entities but not comparable secular entities." *Id.* at 1093 (citing *Tandon v. Newsom*, --- U.S. ---, 141 S. Ct. 1294, 1296 (2021)). *See also Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2020) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542-546 (1993)). The Ninth Circuit concluded that the defendant school officials selectively enforced the district's nondiscrimination policies against the religious student group while recognizing some secular student groups despite their facially discriminatory membership criteria. *Fellowship of Christian Athletes*, 46 F.4th at 1096.

University officials can lose qualified immunity under federal caselaw. In 2021, three federal court decisions clearly established that education officials forfeit their qualified immunity if they derecognize or threaten to derecognize a religious student organization because it requires its leaders to agree with its religious beliefs. The Eighth Circuit, in two separate cases, ruled that University of Iowa officials lost their qualified immunity when they violated the First Amendment by derecognizing two religious student groups because they had religious leadership requirements. The court found that derecognition was unconstitutional viewpoint discrimination against the religious student groups. *InterVarsity Christian Fellowship/USA v. University of Iowa*, 5 F.4th 855 (8th Cir. 2021); *Business Leaders in Christ ("BLinC") v. University of Iowa*, 991 F.3d 969 (8th Cir. 2021). In the *InterVarsity* case, the University's Vice President for Student Life, the Associate Dean of

Student Organizations, and the Coordinator for Student Development forfeited their qualified immunity by derecognizing the religious student groups because of their religious leadership requirements. *InterVarsity*, 5 F.4th at 861. Similarly, in the *BLinC* case, the Eighth Circuit held "that the district court erred in granting qualified immunity to the individual defendants on [the religious student group's] free-speech and expressive-association claims." *BLinC*, 991 F.3d at 972. The officials who lost qualified immunity were the Dean of Students, the Assistant Dean of Students, and the Executive Director of the Iowa Memorial Stadium.

Likewise, a Michigan federal district court found that Wayne State University officials forfeited their qualified immunity when they threatened to derecognize a religious student group because of its religious leadership requirements. *InterVarsity Christian Fellowship/USA v. Bd. Of Governors of Wayne State Univ.,* 534 F. Supp.3d 785 (E.D. Mich. 2021). The court held that the Dean of Students and the Coordinator of Student Life were "not entitled to qualified immunity because the rights [of a religious organization's "internal management, free speech, free association, and free exercise" and under the Establishment Clause] violated were clearly established." *Id.* at 835.

CLS-NH wants only to be a positive contributor to the Franklin Pierce School of Law community. To that end, CLS-NH representatives will meet one last time with the SBA and will answer questions for no more than ten minutes. *They will not answer any questions that touch upon their religious beliefs, speech, practices, policies, or leadership standards.* They will not answer any disparaging questions, including any questions about CLS's or their religious beliefs, speech, practices, policies, or leadership standards.

The guiding principle is that government actors, including the SBA or any university administrator, cannot question any Americans about their religious beliefs. Like all government officials, student government representatives must heed our Republic's timeless lesson:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

If the SBA fails to recognize CLS-NH with all the attendant benefits, including funding, at the next SBA meeting, which we understand will take place tomorrow, October 25, we respectfully request a response from the University no later than COB on October 29 that University of New Hampshire administrators will comply with clearly established federal law and grant CLS-NH official recognition and the full benefits of recognition, including funding.

If I can be of any assistance, I am happy to schedule a time to talk. Also, going forward, please communicate with me rather than the CLS students. It is important that they be

able to concentrate on their studies at this point in the semester and not have to deal further with this unconstitutional treatment.

Thank you for your consideration. I look forward to resolving this matter quickly.

Yours truly,

/s/ Laura Nammo
Laura Nammo
Center for Law & Religious Freedom
Christian Legal Society